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**Sent:** 4/29/2019 2:37:09 PM  
**To:** BOROK Aron [Aron.BOROK@state.or.us]  
**CC:** STURDEVANT Debra [Debra.STURDEVANT@state.or.us]; Labiosa, Rochelle [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ded3654216c9461d95cd5a3ceec507ef-Labiosa, Rochelle]  
**Subject:** RE: Language

Thank you for the reminder Aron! Things have been a little crazy.

At the last OR discussion, Deborah asked for help identifying what language she could cite to in order to say that facility specific information is needed to justify the variance and determine the HAC. This relates to the sentence that says "According to federal regulations and guidance, and as a result of litigation on mercury issues in Michigan, the HAC assigned under a variance must be based on discharger specific data." I believe we commented that you shouldn't refer to the Michigan litigation and even commented that the sentence could be deleted, but Deb wanted some language to address discharger questions. As promised, below are some excerpts from an FAQ document that EPA put out prior to the final rule that has some relevant statements and the preamble language that repeats the key point. Please use anything here that helps.

**MDV FAQs (2013)** (<https://www.epa.gov/sites/production/files/2018-10/documents/discharger-specific-variances-faqs.pdf>)

#### **7. What should a state or tribe keep in mind when justifying the need for a multiple discharger variance?**

In developing an analysis to justify the need for a multiple discharger variance, states and tribes should consider the following three principles. The variance and the justification:

(1) Must meet the same 40 CFR 131 regulatory requirements as an individual discharger WQS variance, and should consider any EPA guidance. Specifically, the state or tribe must fully demonstrate that a factor listed in 40 CFR 131.10(g) precludes attainment of a use specified in CWA 101(a)(2) for the entire variance period. When using 40 CFR 131.10(g)(6), this means that the documentation provided to support the variance must address both the substantial AND widespread components of the economic and social impacts of attaining the designated use and criterion.

(2) Should ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible. A permittee that could not qualify for an individual WQS variance should not qualify for a multiple discharger variance. The demonstration should:

Apply only to permittees experiencing the same challenges in meeting WQBELs for the same pollutant(s), criteria and designated uses.

Group permittees based on specific characteristics or technical and economic scenarios that the permittees share (e.g., type of discharger (public or private), industrial classification, permittee size and/or effluent quality, treatment train (existing or needed), pollutant treatability, available revenue, whether or not the permittee can achieve a level of effluent quality comparable to the other permittees in the group, and/or waterbody or watershed characteristics) and conduct a separate analysis for each group.<sup>7</sup> The more homogeneous a group is in terms of factors affecting attainability of the designated use and criterion, the more credible the multiple discharger variance will be.

Collect sufficient information for each individual permittee, including engineering analyses and financial information, to adequately support the specification of permittee groups for each individual permittee to be covered by the variance (e.g. estimated costs that each permittee may experience, permittee specific revenue).

(3) Should consider an individual variance for a particular permittee if it does not fit with any of the group characteristics (e.g., private vs. public dischargers, large vs. small permittee, or permittees with a parent company vs. those without).

**9. What must a state or tribe keep in mind when determining the appropriate interim requirements for a multiple discharger variance?**

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In general, interim requirements should be established on a permittee specific basis (particularly when demonstrating that the applicable designated use is unattainable based on 40 CFR 131.10(g)(6)), but there may be instances where establishing requirements for a group of permittees may be appropriate (e.g., with “legacy pollutants”, or when hydrologic conditions have been modified). EPA notes that some states have included additional interim requirements, such as requirements to research advances in wastewater treatment or improved management practices, to conduct wastewater treatability studies, to define demonstrated performance of wastewater treatment or other control methods.

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Second, to provide public transparency, this rule requires states and authorized tribes to include specific information in the WQS variance. States and authorized tribes must specify the pollutant(s) or water quality parameter(s) and the water body/ waterbody segment(s) to which the WQS variance applies. A state or authorized tribe must also identify the discharger(s) subject to a discharger specific WQS variance. As an alternative to identifying the specific dischargers at the time of adoption of a WQS variance for multiple dischargers, states and authorized tribes may adopt specific eligibility requirements in the WQS variance. This will make clear what characteristics a discharger must have in order to be subject to the WQS variance for multiple dischargers. It is EPA’s expectation that states and authorized tribes that choose to identify the dischargers in this manner will subsequently make a list of the facilities covered by the WQS variance publicly available (e.g., posted on the state or authorized tribal Web site). It may be appropriate for a state or authorized tribe to adopt one WQS variance that applies to multiple dischargers experiencing the same challenges in meeting their WQBELs for the same pollutant so long as the WQS variance is consistent with the CWA and § 131.14.48 A multiple discharger WQS variance may not be appropriate or practical for all situations and can be highly dependent on the applicable pollutants, parameters, and/or permittees.

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“In justifying the need for a multiple discharger WQS variance, states and authorized tribes should account for as much individual permittee information as possible. A permittee that cannot qualify for an individual WQS variance cannot qualify for a multiple discharger WQS variance.”

*Lindsay Guzzo*

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**From:** BOROK Aron <Aron.BOROK@state.or.us>

**Sent:** Friday, April 26, 2019 3:24 PM

**To:** Guzzo, Lindsay <Guzzo.Lindsay@epa.gov>

**Subject:** Language

Hi Lindsay,

You mentioned that you got some language suggestions from HQ for the variance document. Can you forward that to me when you get a chance?

Thanks,

Aron Borok

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